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Radical Transactionalism: Legal Consciousness, Diverse Economies and the Sharing Economy

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This paper proposes an original theoretical approach to the analysis of community-level action for sustainability, focusing on its troubled relationship to the sharing economy. It shows, through a conversation between scholarship on legal consciousness and diverse economies, how struggles over transactional legality are a neglected site of activism for sustainability. Recognising the diversity of economic life and forms of law illuminates what we call 'radical transactionalism': the creative redeployment of legal techniques and practices relating to risk management, organisational form and the allocation of contractual and property rights in order to further the purpose of internalising social and ecological values into the heart of economic exchange. By viewing sharing economy initiatives 'beyond AirBnB and Uber' as sites of radical transactionalism, legal building blocks of property and capital can be reimaged and reconfigured, helping to construct a shared infrastructure for the exercise of collective agency in response to disadvantage sustained by law.

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INTRODUCTION

The 'sharing economy' has risen to prominence in recent years as recession, outsourcing, environmental depletion and alienation drive workers and consumers into new forms of economic action. As a catch-all term, it has captured the imagination of the mainstream press.¹ In these popular accounts, the understanding of what the 'sharing economy' entails is relatively narrow, focusing on ways in which information technology is used to empower individuals or organisations to distribute, share and re-use excess capacity in goods and services. The substantive focus is often equally narrow, often focusing on pitched regulatory battles between incumbents in the taxi and hotel industries and their respective 'sharing' challengers such as AirBnB and Uber, or on the large amounts of venture capital being offered to these types of initiatives. Indeed, the business models and profit margins of these kinds of initiatives have led many to critique what Dan Gregory calls the 'narrow confines of extractive institutional models that focus ruthlessly on exchange value'.² Yet the notion of a sharing economy, as the phrase itself suggests, has connotations that are more nurturing and generative than extractive, as reflected in the subtitle of Janelle Orsi's pioneering book on *Practising Law in the Sharing Economy*: 'helping people build cooperatives, social enterprise, and local sustainable economies'.³

These tensions are very much at the centre of this paper, the key purpose of which is to explore the implications of the rising interest in the sharing economy for the role of law and lawyers. We make two interventions that we suggest provide a framework for debate about this role. First, we emphasise the plural visions of the sharing economy circulating in current debates. These plural visions grapple with the question of whether sharing economy discourses tend to perpetuate an extractive mindset rather than nurturing new social and democratic possibilities. We stress the importance of understanding the 'sharing economy' as

¹ NPR, 'The Sharing Economy: A Shift Away from Ownership,' *Special Series* (2013), <<http://www.npr.org/series/244583579/the-sharing-economy-a-shift-away-from-ownership>>, The Economist, 'The Rise of the Sharing Economy,' *The Economist*, March 7 2013, <<http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>>, M. Newlands, 'The Sharing Economy: Why It Works and How to Join,' *Forbes*, 18 July 2015, <<http://www.forbes.com/sites/emc/2013/07/30/what-is-the-new-sharing-economy/>>, B. Walsh, '10 Ideas that Will Change the World', *Time Magazine*, 17 March 2011, <http://content.time.com/time/specials/packages/article/0,28804,2059521_2059717,00.html>.

² D. Gregory, 'There is No Such Thing as Capitalism', *Stir Magazine* (August 2014). The concept of extraction, as we use it, refers to a mindset and approach to human relations that enables commodification and exchange by securing the socio-legal boundaries of groups or individual activities in ways that facilitate the monetisation of those activities. For example, Uber's app collects user data via their smart phone so as to extract the maximum value out of their demographic and travel data.

³ J. Orsi, *Practising Law in the Sharing Economy* (2012).

a site that includes community-based sustainability initiatives and grass-roots innovations that mix elements of activism and enterprise.

Second, we interrogate the motif often attributed to the sharing economy, that *access rather than ownership* is central to emerging innovations. Botsman and Rogers⁴ have popularised this motif, breaking it down into four underlying principles that we use to structure our later argument: trust between strangers, a belief in the commons, idle capacity, and critical mass. Through this interrogation, we propose instead that ownership remains much more central than the motif suggests, and that *shared infrastructure* is what matters. We chart four lines of enquiry that can help to frame future research about this question of shared infrastructure. We bring these two interventions together by proposing a conversation between literature on diverse economies and legal consciousness. This conversation provides a *bridge between* our two interventions, in deference to the ongoing empirical open-endedness of sharing economy trajectories. It helps explain how sharing economies understood as practices of constructing shared infrastructure can foster a collective sense of agency in response to disadvantage sustained by law.

Part 1 of the paper explores the potential to view the sharing economy in terms of activism, stressing the plural imaginaries inherent in the way different groups in social media discuss the concept. This allows the reader to envisage what is at stake in debates about the sharing economy, which we think is important before filtering those debates through any particular set of scholarly literature.

In Part 2, we provide just such a scholarly filter, working through literature on diverse economies and on legal consciousness and ‘everyday law’. Bridging these two areas brings something to each. Legality is a neglected facet of debates about the social economy and its relationship to the market economy, especially beyond law and society literature. And the diverse forms of economic life are a neglected facet of legal consciousness literature, in particular in the way they illuminate transactional legalities rather than the more familiar legalities embedded in public law, social welfare and human rights that often dominate law and social change literature.

In Part 3, we explore the emergent ‘everyday law’ of sharing economy initiatives by linking Botsman and Rogers’ four elements of a collaborative economy with the diverse legalities of

⁴ R. Botsman and R. Rogers, *What’s Mine Is Yours: The Rise of Collaborative Consumption* (2010).

preventing harm, negotiating a blurred line between gift and contract, and choosing a legal entity structure for a project, initiative or enterprise. Taken together, these diverse legalities provide a framework for further research on the sharing economy that we articulate as a question of shared infrastructure. We conclude overall that shared infrastructure should be imagined through experimentation with ownership and control in ways that are open to a more diverse array of economic possibilities than neoliberal regulatory frameworks suggest is possible. We stress the potential for lawyers to foster diversity in economic life through 'radical transactionalism', where legal building blocks of property and capital can be creatively deployed to provide a foundation for new social and democratic possibilities.

SHARING ECONOMIES: PLURAL IMAGINARIES

As indicated above, this paper seeks to go beyond the narrow conceptual and substantive preoccupations of popular current understandings of the sharing economy. We would draw the net of this evocative notion more widely, in particular to include community-based sustainability initiatives that emerge as creative responses to resource depletion and climate change. Some sharing economy initiatives, such as car-sharing, co-working and many reuse projects, use web-based technology to enable 'access rather than ownership'. Others, especially in the energy and food sectors, focus on connecting consumers much more closely with producers and stressing the social nature of those ties, even while they also use technology to sidestep intermediaries such as supermarkets or large energy companies. Collectively, they go beyond the narrower understandings of the sharing economy that often dominate popular media accounts, and more towards a vision of renewed forms of collective urban life. These are what Seyfang and Smith⁵ term 'grassroots innovations': 'networks of activists and organisations generating novel bottom-up solutions for sustainable development; solutions that respond to the local situation and the interests and values of the communities involved. In contrast to mainstream business greening, grassroots initiatives operate in civil society arenas and involve committed activists experimenting with social innovations as well as using greener technologies'. Their emphasis on civil society, activism, localism and community is, as we shall see, somewhat in tension with emerging understandings of the 'sharing economy'. Yet sharing economy initiatives have, and continue

⁵ G. Seyfang and A. Smith, 'Grassroots Innovations for Sustainable Development: Towards a New Research and Policy Agenda' (2007) 16 *Environmental Politics* 584.

to, draw on such associations even while they also enact and rely on much more extractive modes of 'business-as-usual'.

In contexts as diverse as community-supported agriculture, community, energy projects, car-sharing, co-working, and reuse/recycle initiatives, plural versions of the sharing economy exist. Ordinary people, perhaps frustrated with the inertia of government policies and large-scale corporate routines and practice, are experimenting with different ways of moving around, powering themselves, securing food and making a living, making these transactions less wasteful and potentially more social. These initiatives challenge well-worn dichotomies between public and private spheres, state and market forms of governance, and economic and social objectives. Their practices often mix elements of activism and enterprise, sometimes uneasily. Some view enterprise as the vehicle for realising activist objectives; others view the two as mutually reinforcing. These practices recognise, in different ways, an ethics of a community economy grounded in what Gibson-Graham describe as 'a need to modify ourselves, to become different, and more specifically [to develop] the capacity to enact a new relation to the economy'⁶.

1. Beyond AirBnB and Uber

Some of the current debates around the sharing economy, especially in the mainstream business press, tend to assume that its participants share the same extractive mindset as when they buy or sell other services. This assumption elides the social and democratic possibilities of sharing. Thus, proponents of an extractive sharing economy point to new possibilities for 'consumption, productivity, unlocking capital and 'micro-entrepreneurs':

the emerging peer-to-peer, collaborative 'sharing economy' will be a significant segment of the country's future economic activity, stimulating new consumption, raising productivity and catalysing individual innovation and entrepreneurship..... The economic engine at work here is an array of new peer-to-peer marketplaces that unlock dormant physical capital (real estate, vehicles, household assets) and put it to productive use, creating, in the process, a wide variety of new consumption experiences (contrast the modest range of hotel rooms with the diversity of AirBnBs),

⁶ J.K. Gibson-Graham, 'An Ethics of the Local' (2003) 15 *Rethinking Marxism* 49.

and catalyzing innovation by micro-entrepreneurs who can dip their toes into the world of small business unimpeded by the risks of an all-or-nothing start-up.⁷

From an investment perspective, collaborative consumption platforms have become new potential sites of securitisation and financialisation. Thus news of ride-sharing firm Lyft taking on Uber with a new round of capital-raising appears alongside more traditional business stories in the Wall Street Journal; AirBnB is subject to capital market valuations, whilst walking a tightrope of making hosts into both micro-entrepreneurs and appropriately friendly participants in a far-reaching social network.

The stretching of individual consumers into vendors of accommodation, drill rental businesses and micro car rental entrepreneurs co-exists, often in tension, with other versions of the sharing economy. Janelle Orsi for example stresses the importance of non-corporate approaches, arguing that:

Botsman's definition of 'sharing economy' [idling capacity, innovation etc.] is noticeably more narrow than how many people have been using the phrase. It doesn't seem to include shared governance, cooperative work, shared information, crowdsourcing, crowdfunding, collective activity, community-building, the commons, cooperative ownership, and many other activities that have been described under the umbrella of 'sharing economy.' I prefer a broader definition because I think it has been helpful in tying these many activities together as part of a movement to create a world where everything is more equitably shared...⁸

The politically open-textured nature of the concept of the sharing economy can be illustrated visually, by charting competing uses of the sharing economy online. Using online network tools, one can demonstrate the partial appropriation of the concept of the 'sharing economy' by economists and investors. Figure 1 below is a network graph of tweets from 14-17 March 2014 that included the hashtag⁹ #sharingeconomy:

⁷ A. Sundararajan, 'Trusting the Sharing Economy to Regulate Itself,' *Economix Blog, NY Times* (2014), <<http://economix.blogs.nytimes.com/2014/03/03/trusting-the-sharing-economy-to-regulate-itself/>>.

⁸ See comments in R. Botsman (2013) 'Sharing Economy lacks a shared definition', <<http://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shared-definition>>.

⁹ Hashtags are user-generated aggregation devices to allow other users to search related interests and follow issues. Data for this graph is from a scrape of some 630 tweets between 14-17 March 2014 with some spammy/automated tweets cleaned and low centrality vertices removed.

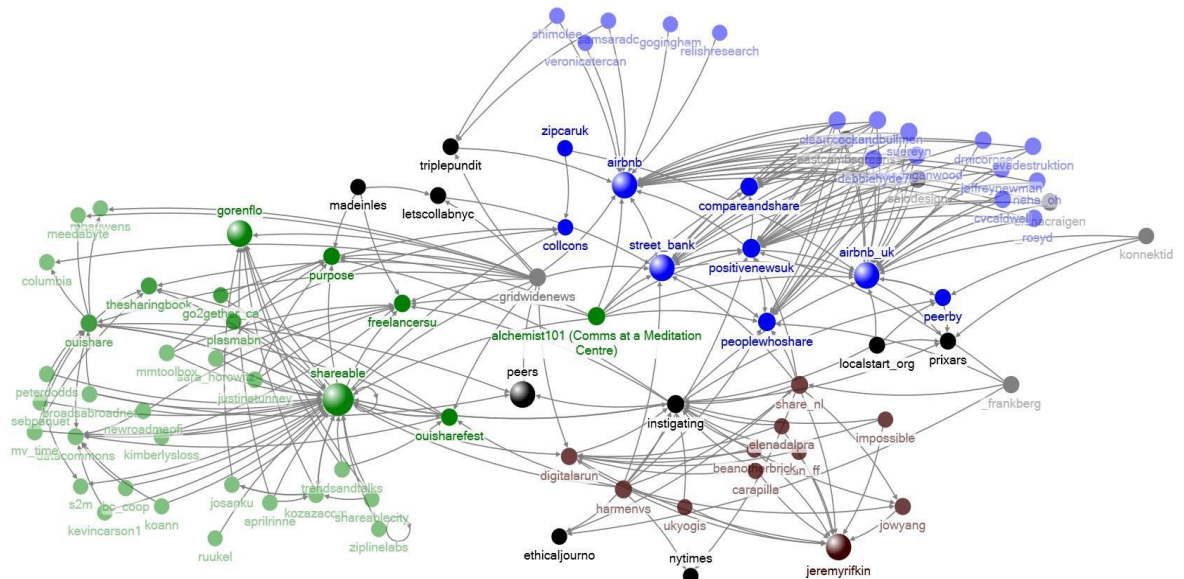


Figure 1: Network graph of high centrality tweets containing #sharingeconomy

We have colour coded the graph to emphasise the divergent uses of the term #sharingeconomy in this short period of time: clusters can be clearly identified. The green cluster on the bottom left mainly tweeted an article from Shareable.net about mapping the growth of new mutual organisations, a perspective that speaks to a growing number of online debates about commons-based approaches to the sharing economy.¹⁰ The brown cluster in the bottom right is based around an article by Jeremy Rifkin arguing that lowering of marginal production costs is both responsible for and will inevitably lead to a rise in sharing economy initiatives, framing this in terms that echo institutional economics. Capitalism, for Rifkin, is a victim of its own successes as certain gifts subsume prices. This is creating a ‘third industrial revolution’ where markets must be remade along the lines of collaborative consumption to allow monetized sharing where gift economies have not taken hold.¹¹ The blue cluster centred around the AirBnB node is comprised of a number of unreflexively enthusiastic collaborative consumption articles. They mostly celebrate Airbnb on its own terms, implicitly communicating an enthusiasm for Hayekian self-organising spontaneity. The nodes of these

¹⁰ K. Stokes et al., 'Making Sense of the UK Collaborative Economy ', NESTA, <https://www.nesta.org.uk/sites/default/files/making_sense_of_the_uk_collaborative_economy_14.pdf>, (2014).

¹¹ J. Rifkin, *The Third Industrial Revolution: How Lateral Power Is Transforming Energy, the Economy, and the World* (2011).

clusters are relatively discrete, showing little dialogue on twitter between extractive proponents and generative proponents of the term.¹²

Network analysis of the way that the concept of the sharing economy is used, then, demonstrates its significant political malleability: there is no inevitability that the political trajectory of the sharing economy will end up as a new form of neo-liberalism. Indeed, to assume such inevitability would be to overstate the intentionality and design in constructing the family of concepts that has sanitised our corporate imagination. Weber warned that the Iron Cage would descend upon us through unintended consequences as much as routinized, calculative planning. Greta Krippner's¹³ exemplary study of the financialisation of America in the 1970s emphasizes policy expediency, rather than power politics or ideological battles as typically conceived in much analysis of the role of neoliberalism. The unity and coherence of the sharing economy should not be overstated, and just as some plumb history for an appreciation of the diversity of corporate forms,¹⁴ we open up below the conceptual underpinnings of plural sharing economies.

2. The legal framework of the sharing economy: regulatory policy or transactional law?

A narrow conception of transactional possibilities underlies much of the public debate about sharing. This is one reason that policy interest in the sharing economy has become an overt flashpoint of debates, certainly in popular media accounts on the blogosphere and in think-tanks like Nesta. Slowly they are also becoming the stuff of government enquiries. In many of these settings, however, there is a tendency to frame the legal and policy issues raised by the sharing economy in all too familiar terms, as a problematic of regulation in which the debate is focused on an appropriate balance between competitiveness and consumer protection alongside anxieties about the misuse of regulatory protection by self-interested incumbents. For example, Professor of Economics Stephen King recently justified 'getting rid of regulation' as 'an improvement to the economy, there will be growth, there will be

¹² The Fringe dots are potentially interesting connectors, albeit idiosyncratic. They are mainly 'retweeters' who pass on the article URL to their own followers. 'New Age' may be the common denominator in the sense that the black and grey information 'brokers' across these different articles are a prolific Portland-based news writer, a communications worker at a meditation centre and a Yoga Association in the UK. Perhaps New Age aptly reflects the ideological messiness of this space.

¹³ G. Krippner, *Capitalizing on Crisis*, (2011).

¹⁴ M. Vatter, 'Un-Limited and Un-Incorporated. From Corporation to Common by Way of Trust' (2013) 3 *Filosofia Politica* 447-64.

more jobs, there will be better utilisation of capital.’ He also questioned whether there is ‘an obligation to look after the incumbents’¹⁵ warning ‘they’re not going to take this stuff lying down’.¹⁶ Arun Sundararajan’s recent testimony to a US Congressional hearing on Peer-to-Peer Businesses warns that:

The current regulatory infrastructure can impede the growth of these businesses, in part because of misalignment between newer peer-to-peer business models/roles and older guidelines developed to mitigate safety concerns and economic externalities for the existing ways of providing the same or similar services.¹⁷

Meanwhile, the UK government’s response by the Department of Communities and Local Government to promoting the sharing economy to aid affordability issues with rented housing in London lamented that ‘thousands of listings [on AirBnB, Gumtree and Onefinestay are] potentially in breach of ... outdated laws.’¹⁸

But law is important in a much deeper way than the question of ‘how to regulate the sharing economy’. It is much more than an infrastructure of repression and denial, and framing the debate as a standard question of regulatory technique misses a vital opportunity to probe more deeply into how we understand the role of law – and lawyers themselves – in opening up the pathways of the sharing economy. It misses the opportunity to reframe exchange itself, to weave social and ecological values into the *heart* of exchange, rather than bolting them onto the edifice of commercial exchange as a protective afterthought. This perspective is one we would capture with the term ‘radical transactionalism’. Instead of tired debates about red tape, special interest politics and regulatory overload, we should try, in Will Davies’¹⁹ words, to ‘extend the liberating elements of productive capitalism into the social realm’, in ways that recognise that no matter how creative or visionary the political and social vision of a pioneer in the sharing economy, the ‘regulatory and legal tramlines that have already been laid down’ will need to be re-imagined. Radical transactionalism is a set of practices that make concrete

¹⁵ anon, 'Regulating the Peer-to-Peer Economy,' *Grattan Institute debate* (2015), <http://grattan.edu.au/wp-content/uploads/2015/02/571_transcript_p2p.pdf>.

¹⁶ Ibid.

¹⁷ A. Sundararajan, 'Peer-to-Peer Businesses and the Sharing (Collaborative) Economy: Overview, Economic Effects and Regulatory Issues,' *Written testimony for the hearing titled, The Power of Connection: Peer-to-Peer Businesses* (2014), <http://smallbusiness.house.gov/uploadedfiles/1-15-2014_revised_sundararajan_testimony.pdf>.

¹⁸ anon, 'Measures to Boost Sharing Economy in London,' *GOV.UK* (2015), <<https://www.gov.uk/government/news/measures-to-boost-sharing-economy-in-london>>.

¹⁹ W. Davies, 'Ways of Owning: Towards an Economic Sociology of Privatisation' (2012) 40 *Poetics* 167.

just such a re-imagining. Janelle Orsi, for example, a pioneer in developing legal support services in the US for the sharing economy, sees a fertile hybridity between a more structurally oriented activism and new forms of enterprise. As she puts it, 'To most law students and lawyers, practicing transactional law isn't an obvious path to saving the world...[but] transactional lawyers are needed, en masse, to aid in an epic reinvention of our economic system.'²⁰

'Radical transactionalism', we would argue, is the creative redeployment of legal techniques and practices relating to risk management, organisational form and the allocation of contractual and property rights, in order to further the purpose of internalising social and ecological values into the heart of economic exchange. The role of law in allowing financiers and entrepreneurs to quantify investments is often overlooked in analyses of the success of capitalism. As Davies points out, concentrating on economic calculability misses the point here: 'Economists may claim to recognize institutions, but they only do so via the effects, and miss the shared illusion which causes them'.²¹ The calculability of economic life that is both mundane and enormously complex is only possible through the socio-legal formatting of contracts, property rights, shareholder voting rights and regulations. In seeing, Davies argues, 'how far equity, voting rights, debt, share, audit and so on can be tweaked in various directions, before they become something else...one starts to imagine a wholly different economy, simply through considering how freedoms, powers and responsibilities might be combined differently, via subtly redesigned legal instruments'.²²

This kind of legal creativity has long been deployed to further extractive economic practices outside of the sharing economy, but the plural trajectories of sharing economies offer the possibility of turning this institutional imagination to different ends. Whilst acknowledging the competitive challenges reimagined initiatives face, 'radical transactionalism' can underpin an incremental reconfiguration of the legal building blocks of property and capital, reframing private business legal skills in ways that shift the shared illusions they generate. Quite specific conceptions of finance, markets, labour and property emerge as a result of the way 'law enables individuals and on institutions to send laser beams from one point in time and space to another, saying 'this is what will take place; this is what we agree has happened;

²⁰ J. Orsi, *Practicing Law in the Sharing Economy: Helping People Build Cooperatives, Social Enterprise, and Local Sustainable Economies*, (2012).

²¹ W. Davies, 'Recovering the Future: The Reinvention of 'Social Law'' (2013) 20 *Juncture* 216-22.

²² W. Davies, '20 Public Spirited Lawyers Could Change the World,' (2013) *Potlatch Blog*, <<http://potlatch.typepad.com/weblog/2013/09/20-public-spirited-lawyers-could-change-the-world.html>>.

this is what must happen; these are the conditions of co-operation'. The plural imaginaries of sharing hinge on the different directions in which legal expertise shoots these 'laser beams' - whether along the current coordinates of concentrated, 'winner-takes-all' ownership, or in ways that chart more democratic forms of economic life.²³

A CONVERSATION BETWEEN LEGAL CONSCIOUSNESS AND DIVERSE ECONOMIES

1. Legal consciousness and dissenting collectivism

As the quotation that ends the previous section suggests, opening up the meanings of sharing economy is an inherently political project. This makes legal consciousness literature an apt lens for exploring the role of law in doing so. There is a tendency in much legal scholarship (and arguably even more so from outside of legal scholarship), to equate law and legality with state policies, forms and regulation. Legal consciousness scholarship challenges this linkage and detaches understandings of legality from formal state policies and regulation, while at the same time paying close attention to the structural role that legal practices can play in sustaining dominant social, economic and political frameworks. In this context, legal consciousness would be a productive lens for understanding how legal practices sustain extractive versions of the sharing economy. However, we are particularly interested in focusing on how legal practices can open towards more generative visions of the sharing economy. In what follow, we explain how recent work on a neglected dimension of legal consciousness – dissenting collectivism – can be extended to link with the discussion of radical transactionalism in Part 1. The core of our argument in this Part 2 is that radical transactionalism can be fleshed out by filtering the legal consciousness of dissenting collectivism through the perspective of the literature on diverse economies. Our main aim is to provide theoretical grounding for the conceptual research agenda we sketch out in Part 3 along with some concrete examples to bring some life and colour to that research agenda. As Halliday and Morgan have argued,²⁴ within the Critical Legal Studies movement and Marxist sociology of law, legal consciousness was taken to be both a constituent element of the legal system and a description of law's hegemonic role in sustaining domination. However, legal consciousness operated within the CLS tradition as a theoretical tool largely in the absence of

²³ Ibid.

²⁴ S. Halliday and B. Morgan, 'I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination' (2013) 66 *Current Legal Problems* 1.

empirical enquiry.²⁵ Legal consciousness literature explored the notion of law possessing hegemonic power as an *empirical* puzzle²⁶ related to the theory of hegemony. Ewick and Silbey's contribution is particularly important here.²⁷ They suggest that law draws its institutional support and the consent of those it systematically disadvantages as a result of the interplay between two of three 'narratives' (or cultural schema) of legality: 'before the law' and 'with the law'. The fact that these opposing narratives may be invoked in different settings and at different times, permits legality, they suggest, to maintain its position of domination and to retain the faith of its subordinates despite its failures and injustices.

The forms of consciousness we call 'before the law' and 'with the law'... [w]hile - ostensibly expressing vastly different and contradictory images of legality, together... constitute a hegemonic conception of law. At any moment, the law is both a reified transcendent realm, and yet a game... Challenges to legality for being only a game, or a gimmick, can be repulsed by invoking legality's transcendent reified character. Similarly, dismissals of law for being irrelevant to daily life can be answered by invoking its gamelike purposes. Through these forms of consciousness (and the opposition between them), legality can be an uncontested and unrecognized power that sustains everyday life.²⁸

Halliday and Morgan complicated this explanation, however. Their secondary data-based study of radical environmental activists²⁹ demonstrated the importance of a legal consciousness of dissenting collectivism, something they described as a powerful combination of the gaming potential of state law and a sense of a higher transcendent law above state law. This narrative or cultural schema is one 'wherecollective identity is particularly significant, yet state law to varying degrees is rejected...State law is critiqued as being oppressive to groups and, more significantly, is struggled against – ... in a group-based

²⁵ A. Hunt, 'The Theory of Critical Legal Studies' (1986) *Oxford Journal of Legal Studies* 1.

²⁶ D.M. Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) *Stanford Law Review* 575, A. Sarat and T.R. Kearns, 'Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life,' in *Law in Everyday Life*, ed. Austin Sarat and Thomas R Kearns (1995).

²⁷ P. Ewick and S.S. Silbey, *The Common Place of Law: Stories from Everyday Life*, (2014) 9.

²⁸ Ibid.

²⁹ The activists were involved in the Earth First! Network during the 1990s in and around Manchester, Oxford and North Wales, UK. They were interviewed for a project conducted from 2000 to 2002 entitled Radical Participation: Activists' Identities and Networks in Manchester, Oxford and North Wales. Halliday and Morgan conducted secondary data analysis of 57 semi-structured interviews archived in the UK Data Archive.

attempt to alter the structures of power in society’.³⁰ For the activists in Halliday and Morgan’s study, this combination fuelled a strong critique of state law and sustained their counter-hegemonic struggles. It thus did not operate to promote legality as an uncontested and unrecognised power, as earlier legal consciousness studies sometimes implicitly suggested, but instead potentially opened up opportunities to build alternative imaginaries and institutions.

Now it is fair to say that the data in Halliday and Morgan’s study, focusing as it did on radical environmental activists involved in direct action at the margins of mainstream economic life, pointed to significant limits on this potential for opening up alternatives – limits that were typified by a strong sense of fatalism about the specific potential of law to secure social change. However, even in relation to this form of activism, the study demonstrated and discussed the visible threads of a positive institution-building potential inherent in the legal consciousness of dissenting collectivism. Halliday and Morgan³¹ commented that these threads built on the complex relationship between legal consciousness in relation to property and capital on the one hand, and environmental legal consciousness on the other hand. While many radical environmental activists associated legality with formal state policies that secure and uphold arrangements of property and persons that they would consciously and explicitly reject, they also articulated a more positive, holistic conception of ownership and property at times. They did not, in that study, articulate those alternative conceptions in terms of law or legality, but the present paper takes this step forward.

We would argue that the likelihood of such positive potential for building alternative institutions is strongly present in the context of the sharing economy. Moreover, emerging practices of ‘radical transactional law’ open up opportunities to link this potential specifically to legal consciousness. From this angle, the legal consciousness of dissenting collectivism is a form of activism that challenges any assumptions of a dichotomy between campaigning, advocacy and direct action on the one hand, and building new ways to experience political social or economic life on the other hand. Dissenting collectivism from this angle stresses how campaigning and advocacy and even direct action often emerge as necessary *complements* to the positive institution-building activities of grassroots innovation. The sharing economy demonstrates just such a relationship. As such, it is a classic instance of what Halliday and Morgan called scholars to explore at the end of their article: an

³⁰ Halliday and Morgan, op. cit., n. 24.

³¹ Ibid.

‘orientation to formal state law and power that still enacts the ethical commitments of dissenting collectives but [is] more positive than negative and open to senses of ‘legality’ beyond formal state law’.³² How, then, could we explore in more detail the legal practices that might align with the substantive commitments of a generative, nurturing vision of the sharing economy? We suggest that building links with literature on diverse economies is a fruitful next step: one which opens up the possibility of mapping the ‘diverse legalities’ of sharing economies.

2. Diverse economies

While legal consciousness literature can help frame an exploration of the legalities that underpin different articulations of the sharing economy, it is important to focus on practices rather than solely on ideas. Literature on diverse economies is very helpful here, and helps avoid a much debated tendency for legal consciousness approaches to slip into a chronicling of individualised mental states, eliding the social, collective and cultural dimensions of legality.³³ Gibson-Graham³⁴ argue that the range of practices that constitute typical conceptions of the economy are overly focused on 'capitalocentric' practices surrounding markets, labour, finance and property. These are, they argue, just the tip of the iceberg in terms of actually existing non-capitalist practices and liberatory economic projects observable in the here and now. For example, they use an ‘iceberg’ diagram to illustrate the diversity of practices around working, stressing the partiality of the central image of exchanging wage labour for money payments by a capitalist firm on market terms:

³² Ibid.

³³ S. Silbey, ‘After Legal Consciousness’ (2005) 1 *Annual Review of Law and Social Science* 323.

³⁴ J.K. Gibson-Graham, *A Postcapitalist Politics* (2006).



Figure 2: Community Economies website, www.communityeconomies.org/Home/Key-Ideas

A more structured and broader version of this approach is based on typologies that sort various practices related to labour, enterprise, finance, transactions and property, dividing them into capitalocentric, alternative market and non-market practices:

LABOR	TRANSACTIONS	PROPERTY	ENTERPRISE	FINANCE
Wage	Market	Private	Capitalist	Mainstream Markets
ALTERNATIVE PAID Self-employed Reciprocal labor In-kind Work for welfare	ALTERNATIVE MARKET Fair trade Alternative currencies Underground market Barter	ALTERNATIVE PRIVATE State-managed assets Customary (clan) land Community land trusts Indigenous knowledge (Intellectual Property)	ALTERNATIVE CAPITALIST State owned Environmentally responsible Socially responsible Non-profit	ALTERNATIVE MARKET Cooperative Banks Credit unions Community-based financial institutions Micro-finance
UNPAID Housework Volunteer Self-provisioning Slave labor	NON-MARKET Household sharing Gift giving Hunting, fishing, gathering Theft, piracy, poaching	OPEN ACCESS Atmosphere International Waters Open source IP Outer Space	NON-CAPITALIST Worker cooperatives Sole proprietorships Community enterprise Feudal Slave	NON-MARKET Sweat equity Family lending Donations Interest-free loans

Figure 3: Community Economies website, www.communityeconomies.org/Home/Key-Ideas

Some diverse economy approaches further develop this typology into a more overtly ethically inflected argument in favour of making visible 'community economies'. Community economies are constellations of diverse economic practices that reject mainstream notions of 'the economic' as something opposed to and distinct from 'the social'. Gibson-Graham, Cameron and Healy,³⁵ for example, make an eloquent plea to 'take back the economy', reimagining labour, markets, finance and property in the process. As Peter North reminds us, small business owners are not associated only with values of competition, economic growth, and profit maximization as much urban governance practice and research assumes, but often equally or preferably value self-actualization, sustainability and community (North 2015). The sites where community-based sustainability actions meld activism and enterprise are very often small businesses of a kind. From the point of view of diversity neutrally understood, the important point is this: the sharing economy is as much a solidarity food cooperative as it is a private proprietary platform for local food distribution such as FarmDrop, as much a community-owned renewable energy scheme as the energy investment platform Mosaic, as much a social enterprise bicycle shop as it is the corporate ride-sharing platform Uber.

Of course, diversity as such is rarely ethically neutral, and there are many important differences between these examples. While they may share the capacity to disrupt current markets, their deeper systemic implications are contested, as we saw in Part 1. But that contestation is best explored by moving away from assumptions about what is implicated in the form, say of the firm. As North commented in relation to diverse economies literature, 'A firm might need to make a profit, but what constitutes 'profit' as opposed to costs or reinvestment and how much is 'enough' profit, is discursively produced, and consequently economies are composed of diverse sets of practices that cannot be reduced to one singular driver'.³⁶ These diversities of economic form have important legal implications.

3. Diverse legalities of sharing economies

While diverse economies literature has not to date explored law and legality in any detail, an interesting bridge can be built to begin this conversation by way of engaging with one of the

³⁵ J.K Gibson-Graham et al, *Take Back the Economy: An Ethical Guide for Transforming Our Communities*, (2013).

³⁶ P. North, 'The Business of the Anthropocene? Substantivist and Diverse Economies Perspectives on Sme Engagement in Local Low Carbon Transitions' (2015) *Progress in Human Geography* 339

grey literature strands of commons-based approaches to sharing economies. David Bollier's work on the commons³⁷ highlights the importance of exploring what he terms 'vernacular law'. Vernacular law alludes to forms of 'everyday legality', grounded in custom and social practice rather than formal statutes and judicial decisions, and reflecting a rough popular consensus and a keen knowledge of local realities.³⁸ This links to Halliday and Morgan's point³⁹ that the positive institution-building potential inherent in dissenting legal collectivism suggests a preference for holding formal law at bay for a period while new socio-economic imaginaries are forged. Bracketing the power of existing legal and regulatory frameworks and practices 'for the time being', and crafting diverse legalities in the temporary interstices meanwhile, is motivated by the difficulty of reworking the institutional underpinnings of the economic system without the legal building blocks of property and capital.

We see this in the context of sharing economy initiatives, driven by several factors. First is the heavy reliance on mutual trust and quantitative reputational feedback systems, particularly in the collaborative consumption arena. The second is a sense that many sharing economy initiatives are more personal rather than commercial, more informal rather than formal - at least at their inception. And thirdly, many sharing economy initiatives express a powerful commitment to the practices existing in an anti-bureaucratic space. For some, this is a fairly straightforward opposition to state-based regulation, while preserving autonomy to craft elaborate self-regulatory linkages in the 'black box' of platform protocols and terms of use. Those committed to a more generative and less extractive model of political economy take this commitment further, to the point of resisting rational modernization. This may arise out of an instinct of how closely the protocols of rational modernization here are tied to extractive business models.

These factors shape the ways in which existing 'legal and regulatory tramlines' (Davies 2013b) appear as overt hindrances to the flourishing of sharing economies, whether

³⁷ D. Bollier and S. Helfrich, eds., *The Wealth of the Commons: A World Beyond Market and State* (Levellers Press, 2014), B. Weston and D. Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, (2013). Bollier has also written an academic monograph with Burns Weston: *Green Governance* (Burns and Weston 2013), where he also articulates this conception of vernacular law: however the argument is there developed in dialogue with Weston's human rights scholarship to argue ultimately for a 'human right to the commons'. Although debating the merits of this approach is interesting it is not salient to the present article.

³⁸ D. Bollier and B. Weston, 'Advancing Ecological Stewardship Via the Commons and Human Rights,' in *World Watch Institute: State of the World 2014: Governing for Sustainability* (2014).

³⁹ Halliday and Morgan, op. cit., n.24 at 26.

generative or extractive. Particularly for dissenting collectivists, these tramlines undermine attempts to shift the creation of the ‘shared illusions’ we alluded to in Part 1.⁴⁰ Dissenting collectivist visions seek to create a different ‘atmosphere’ in the sense of ‘a space of resonance in which certain kinds of thought and practice seem natural and desirable’.⁴¹ The space of resonance emerging around sharing economies is one in which hybrid practices challenge standard legal categories, creating an uneasy relationship with existing formal-legal systems that throw up regulatory barriers and treat ‘grey areas’ as disabling risk. Vernacular versions of transactional legality enact instead the kind of ‘everyday law’ recognised by legal consciousness perspectives.

In this particular context of sharing economies, vernacular legalities are emergent forms of lawful life that try to redefine or rearticulate customs around exchange. Vernacular legalities are, in a way, the institutional regularities of those diverse forms of economic life under the waterline from the iceberg diagram. Some of the vernacular legalities, explored further in Part 3, open up space for a radical transactionalism that animates the perspective of dissenting collectivism. As we shall see further below, many of these projects are fighting for conceptual breathing space to work through diverse legalities that detach from standard conceptions of property and capital. The shared illusions about law reveal themselves here in part through collective disillusion. Legal scholars interested in diverse legalities, like diverse economies scholars interested in community economies, also gesture towards a specifically ethically inflected vision, one which Davina Cooper's words capture well: ‘a vision of the ‘good society’ in which pro-ecological practice [is] linked to more egalitarian, trust-based, and communal forms of work and trade.’⁴² The next part of the paper explores four pathways towards this vision that are opened up by exploring the sharing economy through the perspective of diverse legalities.

PATHWAYS OF DIVERSE LEGALITIES

The capaciousness of the sharing economy documented in Part 1 has important consequences for the task of imagining alternatives. Following the direction set by Part 2, rather than jumping directly to the intentional redesign of ‘new’ or ‘alternative’ economies by immediately

⁴⁰ W. Davies, ‘Recovering the Future: The Reinvention of ‘Social Law’’ (2013) 20 *Juncture* 216.

⁴¹ P. Sloterdijk, *Spheres* (2011), cited in A. Amin and N. Thrift, *Arts of the Political: New Openings for the Left* (2013).

⁴² D. Cooper, ‘Time against Time: Normative Temporalities and the Failure of Community Labour in Local Exchange Trading Schemes’ (2013) 22 *Time & Society* 31.

specifying detailed legal solutions, we focus rather on making visible the potential for radical transactionalism inherent in the diverse legalities that already inhabit the current institutional landscape. This is important because the narrowing of what people understand by the sharing economy has happened with remarkable pace. In early 2013, usage of the concept of ‘collaborative consumption’⁴³ could be easily *contrasted* with ‘the sharing economy.’ By 2015, the two terms have become much more synonymous in common use. If, as Wittgenstein suggested, usage is meaning, this shift is highly consequential for those trying to reclaim the future from capitalocentric conceptions of finance, markets, labour and property.

In their influential account, Botsman and Rogers⁴⁴ suggested collaborative consumption rested on four elements: trust between strangers, belief in the commons, idle capacity and critical mass. These four elements comprise an uneasy yet fertile mix of diverse possible trajectories. As we elaborate on in more detail below, the notion of idle capacity has been a kind of institutional vector, embedding a techno-optimistic, extractive version of sharing into the shared imaginaries of those drawn to this space. Without the vector of idle capacity, the sharing economy can be much more easily imagined as an activist social movement - a critical mass of initiatives that enact a belief in the commons, drawing on widespread trust between strangers. In what follows, we show how Botsman and Rogers’ four elements can be reimagined through a lens of diverse legalities in the context of community-based sustainability and sharing economy initiatives. Our intention is to point forward towards potential research lines along these paths rather than to document exhaustively or systematically emerging patterns. But building on the framework established in Part 2, we do highlight in particular the potential for sharing economy pathways that institutionalise a legal consciousness of ‘dissenting collectivism’, in this way keeping open the sense of plural and diverse legalities in this space. Our emphasis is mainly on a conceptual mapping that helps to open up an ongoing research agenda, more than on identifying highly specific legal solutions, but we use examples of existing debates about solutions where relevant.

1. Idling potential and the legalities of organisational form

Idle capacity or, as it is sometimes phrased, idling potential, conveys an image of dormant assets waiting to be monetised. Time, space, skills and household objects that lie out with the

⁴³ Botsman and Rogers, op. cit., n.4.

⁴⁴ Ibid.

borders of a 'market economy' are drawn inside those borders and commodified according to standard economic dynamics of supply and demand. In a range of sharing economy contexts, corporate sharing platforms make this attractive in language that draws on both competition and community, promising low barriers to entry and low transaction costs at the same time as painting a vision of warm, informal social relations. Borrowing a drill from a neighbour through a proprietary platform is depicted as preferable to the burdens of ownership. The legalities that make this mix possible are subtly yet solidly present: platform users need to confirm their identity, sign off on extensive 'terms of use' that cover insurance and other liabilities, and most importantly, pay a fee to the platform owner. These practices engage issues of trust and regulation that we take up further below. But they also bracket questions of organisational form, which is at the heart of the notion of reusing idle capacity. This notion resonates with powerful images of sweeping up the excess energy, resources and goods of a wasteful society, and as such is in many ways at the implicit heart of the claims to sustainability that sharing economies might foster. But it is also explicitly about mobilising economic capital, turning time, goods and space from passive and inert to active and flowing. And as far as legal tools that channel the activity of sharing in this way are concerned, the question of the formal legal entity is central. The organisational forms and practices engendered by specific legal entities channel the activities of sharing economy initiatives along specific pathways, acting as a vehicle for spelling out who owns what and on what terms it can be shared.

Failure to recognise the full range of possible variation in legal entity structures that bring the sharing economy to life has the effect of sanitising organisational forms of sharing. A monoculture of private proprietary corporations is all too often assumed as the engine that drives the extractive sharing economy. But there are a myriad ways in which this form can be tweaked, pulled and pushed to animate imaginaries of belonging and commons, rather than exclusion and extraction. The choice of a legal entity for the formalisation of an initiative determines the structure of property rights and the relative centrality of profit. The question of precisely what *is shared* (and between who) in the sharing economy is in large measure constituted by the rules embedded in or accreting to legal entities. Legal entity choice can often formalise, directly or indirectly, previously open-textured and informal ways of mitigating harm or blurring gift and contract. Some attempt to build this open-texturedness *into* legal entity form is, however, newly apparent in Anglo-American settings, in the introduction of new legal structures that braid together profit and social purpose.

New hybrid organisational forms that combine characteristics of for-profit businesses and community sector organizations have emerged in the UK, USA and Canada in recent years.⁴⁵ In the UK, the Community Interest Company structure introduced in 2005⁴⁶ legislatively constrains key internal corporate governance decisions via distribution caps, dividend restrictions and asset locks, as well as regulating the content of ‘community interest’ - Canada has largely followed this with a structure called a community contribution company.⁴⁷ The US has one similar, but relatively little-used hybrid structure (low limited liability company) but the US ‘benefit corporation’ is much more popular and was recently introduced in the influential Delaware jurisdiction.⁴⁸ Benefit corporations are shaped by externally-focused reporting, disclosure and transparency obligations rather than internal governance constraints, and the content of ‘benefit’ is left to enterprise discretion. These are available in about 16 states, and a related certification system by a private organisation called ‘B-Lab’ (who lobby for a model version of benefit corporation legislation they have written) is available in any jurisdiction, and is being promoted beyond the USA, including in Australia and the UK.⁴⁹

This swirl of structural experimentation is stirring up conceptual rethinking about the legal structure of economic entities, from Simon Deakin’s emerging efforts to reimagine the

⁴⁵ See R.Ridley-Duff and M. Bull, *Understanding Social Enterprise: Theory and Practice* (2015, 2nd edn.); J. Defourney, 'From Third Sector to Social Enterprise: A European Research Trajectory,' in *Social Enterprise and the Third Sector: Changing European Landscapes in a Comparative Perspective* ed. Jacques Defourney, Lars Hulgard, and Victor Pestoff (2014).; E. Talley, 'Corporate Form and Social Entrepreneurship: A Status Report from California (and Beyond) ' (paper presented at the Association for Corporate Counsel 2012 Annual Meeting, UC Berkeley Public Law Research Paper No. 2144567, available at <<http://ssrn.com/abstract=2144567>>. A debate is in the early stages in Australia over the desirability or otherwise of introducing a specific legal entity structure that would explicitly address organisational hybridity. The Social Innovation, Entrepreneurship and Enterprise Alliance (SIEE), which was a consortium of social enterprise support organisations in Australia, produced, via its Legal Models Working Group (‘LMWG’), a report outlining the rationale for a distinctive legal structure for social enterprise, and evaluating the pros and cons of the options introduced in UK, US and Canada: LMWG, (2014) *The Legal Models Working Group Final Report, a Report Prepared for the SIEE*, < <http://www.employeeownership.com.au/wp-content/uploads/2015/02/Legal-Models-Working-Group-Draft-Final-Report.pdf>>. A Committee of the Australian Department of Treasury recently considered the report.

⁴⁶ The Companies (Audit, Investigations and Community Enterprise) Act 2004 (UK).

⁴⁷ S. Manwaring, A. Valentine, and M. Thomson, 'Social Enterprise in Canada: Structural Options,' in *MaRS White Paper Series* (2011).

⁴⁸ D.B. Reiser, 'Benefit Corporations-a Sustainable Form of Organization' (2011) 46 *Wake Forest L. Rev.* 591.

⁴⁹ J.K.Grant, 'When Making Money and Making Sustainable Societal Difference Collide: Will Benefit Corporations Succeed or Fail? ' (2013) 46 *Indiana Law Review* 581; Talley, op. cit., n.45. The B-Lab certification process appears to be gaining some traction in Australia quite rapidly, with 20 companies so far certified, some 400 ‘in the pipeline’ , and bi-weekly ‘B-Lab breakfasts’ at the Melbourne Hub to provide information to potentially interested applicants. There is less interest in this in the UK, possibly because of the existence of the Community Interest Corporation structure since 2005.

conceptual basis of the corporation as a commons rather than a nexus of contracts,⁵⁰ through to Rory Ridley-Duff's enquiry into communitarian perspectives on social enterprise.⁵¹ The prominence of commons and communitarian principles in these responses is a reminder that a much older legal entity form is also available for institutional experimentation in the sharing economy: the cooperative. There has indeed been a revival of interest in institutionalising sharing initiatives in cooperative forms⁵² and a particularly spirited debate on this in the US⁵³ where unions are now supporting efforts to build worker-owned cooperatives offering ride-sharing services⁵⁴ and New York City has enacted a significant package of legislative and financial support for cooperatives.⁵⁵ Diverse legal entity structures, then, are the most obvious legal correlate of diverse economies, reflected quite directly in the 'enterprise' column in Figure 3 above. They constitute a fertile line of enquiry for questions of how to institutionalise dissenting collectivism, one that will contribute to diverse economies literature on alternative capitalist and non-capitalist forms of enterprise, as well as to broader debates about the links between sustainability and the social economy.⁵⁶

Of course, legal structures do not exist in a vacuum and the larger political-economic context, particularly of finance, can limit the potential of alternative corporate forms. For example, Henry⁵⁷, in his analysis of changes in cooperative law in Europe, Latin America and India, shows how legal changes that provide cooperatives with greater space to set their own rules 'underestimate the pressure of the financial market'—the upshot is that cooperatives tend to insert investor-friendly clauses in their statutes and by-laws. This wider context highlights the

⁵⁰ S. Deakin, 'The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise' (2011) (2012) 37 *Queen's Law Journal* 339.

⁵¹ R. Ridley-Duff, 'Communitarian Perspectives on Social Enterprise' (2007) 15 *Corporate Governance: An International Review* 382.

⁵² I. Corbino, 'The Italian Solidarity Economy's Slow Revolution. Grassroots Economic Organizing,' (*GEO Newsletter* 2, no. 12 (2012), <<http://www.geo.coop/story/italian-solidarity-economy%E2%80%99s-slow-revolution>>, P. Graefe, 'Whose Social Economy? Debating New State Practices in Qu'Ebéc' (2001) 21 *Critical Social Policy* 35.

⁵³ J. Orsi, *Practicing Law in the Sharing Economy: Helping People Build Cooperatives, Social Enterprise, and Local Sustainable Economies*, (2012), T. Scholz, 'Platform Cooperativism Vs Thesharing Economy,' *Medium* (2015), <<https://medium.com/@trebors/platform-cooperativism-vs-the-sharing-economy-2ea737f1b5ad>>.

⁵⁴ K. Harris, 'Cabby-Owned Taxi Cooperatives on the Rise,' *Shareable* (2015), <<http://www.shareable.net/blog/cabby-owned-taxi-cooperatives-on-the-rise>>.

⁵⁵ Democracy at Work Institute, 'Moving Past the "Tale of Two Cities": New York City Enacts First Pro-Worker Cooperative City Legislation in the United Statesw,' *US Federation of Worker Cooperatives* (2015), <<http://institute.usworker.coop/news/moving-past-“tale-two-cities”-new-yorkcity-enacts-first-pro-worker-cooperative-city>>.

⁵⁶ S. Connelly, S. Markey, and M. Roseland, 'Bridging Sustainability and the Social Economy: Achieving Community Transformation through Local Food Initiatives' (2011) 31 *Critical Social Policy* 308.

⁵⁷ H. Henry, 'Trends and Prospects of Cooperative Law,' in *International Handbook of Cooperative Law* (2013), 7.

importance of widely shared values such as a belief in the commons, Botsman and Rogers' second element of collaborative consumption.

2. Belief in the commons and blurred lines between gift and contract

Belief in the commons is in many ways the much more public face of notions of the sharing economy, evoking a resonance between gifts, common property and everyday notions of sharing. This dimension of the diverse legalities of sharing economies is the one that provides the most space for legality to take a range of potentially elastic forms beyond the confines of formal-rational state law. Whereas alternative corporate forms are almost by definition embodied in positive law, the legalities that underpin a belief in the commons are much closer to the emergent forms of lawful life that redefine customs around exchange. In this context, it is perhaps ironic that the core legal element of private proprietary corporate ownership is the 'share'. Shares as a form of tradeable property rights contrast with processes of sharing and mutuality as embodied practices of belief in the commons. This tension is at the heart of the slippage inherent in the practical manifestation of different versions of the sharing economy.

It is not surprising then that in many sharing economy settings, a blurring of the line between gift and contract occurs in ways that complicate diffuse notions of collective sharing. The vernacular legalities discussed in Part 2 are important here, especially the way in which, as noted above, they provide space for ambiguity, slowing down, and a greater centrality of social relations and collective dialogue. These qualities are particularly salient to efforts to institutionalise dissenting collectivism. They embody a sense of care, a dimension of ethical inter-personal relations that often sits uneasily with positive law.

For example, there has been substantial criticism of large-scale web platforms (of the kind that anchor many sharing economy initiatives) for the ways in which they depend upon and often exploit the gifted labour of their users. While much of this criticism is focused on political defences of equality and collective autonomy⁵⁸, placing gifts at the heart of a 'business model' can also rub up directly against formal legal requirements. This happens particularly in the area of employment, in the context of volunteer labour and precarious

⁵⁸ J. Schor, 'Debating the Sharing Economy' (2014), Great Transition Initiative, <http://www.greattransition.org/publication/debating-the-sharing-economy>

work conditions – so for example, some aspects of timebanking can attract tax liability⁵⁹ or even disqualification from state disability allowances.⁶⁰

The role of intellectual property rights in sharing economy initiatives can blur the line between gift and contract. Yochai Benkler's well-known work on peer production emerges out of experiments in the production of open-source software, and he describes the projects that he characterises as peer production as 'governance without property and contract'.⁶¹ In concrete terms, this means participants use 'flexible, overlapping, indeterminate systems of negotiating difference and permitting parallel inconsistencies to co-exist until a settlement behaviour or outcome emerges', as he puts it – an open-ended way of relating that 'permits for prolonged experimentation and debate, rather than reaching closure earlier'.⁶²

This links back to the question of alternative corporate forms and diverse legal entities, especially where open-source business models try to combine with ways to generate an income stream that will sustain project founders over a longer term. As Michel Bauwens and his colleagues describe their aspiration to develop open cooperativism:

You can only use [peer-to-peer created] commons if you reciprocate to some degree...the idea is to keep the accumulation within the sphere of the commons. Imagine that you have a community of producers, and around that you have an entrepreneurial coalition of cooperative, ethical, social, solidarity enterprise. The idea is that you would have an immaterial commons of codes and knowledge, but then the material work, the work of working for clients and making a livelihood, would be done through co-ops.⁶³

In finance, the growing popularity of crowdfunding pushes at the boundaries separating loans and donations. Some of the creative work being done here can draw on ideas developed around the design of intellectual property by 'hactivists' embedded in the open-source

⁵⁹ G. Seyfang and A. Smith, *The Time of Our Lives: Using Time Banking for Neighbourhood Renewal and Community Capacity Building* (2002), <http://www.i-r-e.org/bdf/docs/a002_time-banking-for-community-capacity-building.pdf>.

⁶⁰ C. Kyriacou, J.N. Lasker, and E. Collom, *Equal Time, Equal Value: Community Currencies and Time Banking in the US* (2012).

⁶¹ Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006).

⁶² Y. Benkler, 'Peer Production and Cooperation,' in *Handbook on the Economics of the Internet*, ed. JM Bauer and M Latzer (2015).

⁶³ M. Bauwens, D. Kleiner, and J. Restakis, 'Towards a Material Commons: Cooperativism, Peer Production and Community Venture Funds for the Commons, Interview with Michel Bauwens, Dymitri Kleiner and John Restakis,' *C-Realm Podcast* (2014), <<http://guerrillatranslation.com/2014/01/28/towards-a-material-commons/>>.

movement. And the blurred line between gift and contract is particularly prominent in the domain of financing. The legalities of expanding web-based crowd-funding from donation sites (such as Pozible or Kickstarter) to the sourcing of equity finance are the subject of ongoing or recent reforms in Australia, New Zealand and the USA.⁶⁴ Moving from donation to investment echoes a shift from gift to contract and even beyond to property rights. As this shift in perspective occurs, a wide range of fears emerge regarding regulatory risk. The formality and anonymity of a web-based platform which accords secured personal property rights in one's company to strangers over the internet generates a sense of risk unable to be addressed by emergent customs based on gift-like relationships. On the other hand, the very appeal of crowd-funding in part inheres in the capacity to generate a sense of shared community in relation to the funded project, a sense which in part rests on just such 'gift-like' relationships. The ambiguity of these hybrid dimensions of crowdfunding complicates the design of different regulatory solutions: this can be illustrated in the view sometimes expressed by advocates of legalising crowdfunding that those investing equity in social enterprise are never truly expecting to be repaid, but rather to recycle any earned surplus as further donations.

Similar issues are raised by recent spirited debates in the UK about the tax benefits and regulatory recognition of renewable energy cooperatives. This debate began in June 2014, when the Financial Conduct Authority first rejected applications for new renewable energy co-operatives alleging they are not 'bona fide co-operative societies' because members are not 'economically participating' in the business⁶⁵. The dispute relates to FCA rules requiring new cooperatives to show active member participation in trading activities⁶⁶. A spokesperson for DECC remarked that they have been "... working with the FCA to ensure the right balance is struck between member protection and realising the enormous potential of community energy"⁶⁷ Gift relationships release significant potential for innovation in the

⁶⁴ Corporations and Markets Advisory Committee (CAMAC) Report, *Crowd Sourced Equity Funding*, (2014), <[http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2014/\\$file/CSEF_Report_21May2014.doc](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2014/$file/CSEF_Report_21May2014.doc)>. This report discusses the regulatory frameworks in place in Italy, New Zealand and the USA and makes recommendations for reform in Australia.

⁶⁵ See <<http://communityenergyengland.org/about/barrier-busting/fca/>>.

⁶⁶ FCA rules require lists as 'buying from or selling to the society', 'using the services or amenities provided by it' and 'supplying services to carry out its business'. Unlike shops trading physical goods, energy cooperatives in the UK are too small to comply with electricity retailer regulations. Therefore, energy is often sold through brokers.

⁶⁷ A. Vaughan, 'Green Energy Co-Ops Blocked by Government Regulator,' *The Guardian* (2014), <<http://www.theguardian.com/environment/2014/aug/15/green-energy-co-ops-blocked-by-government-regulator>>.

direction of radical transactionalism but re-regulating protection often assumes the kind of extractive commercial relationship that ‘community energy’ set out to challenge. As those controlling existing power dynamics push back against dissenting collectivism, vernacular legalities are challenged by existing positive law. Debates in this context frequently turn to questions of regulation, risk management and the prevention of harm, as we do now.

3. Trust between strangers and the legalities of preventing harm

The interaction of the other core elements of a sharing economy initiative becomes important when gift relations come under pressure from the spectres of harm and risk. On the one hand, positive law can literally enact strictures of care and responsibility when it restructures formal legal entities into more democratic, horizontal and generative forms – this is the promise of ‘radical transactionalism’. On the other hand, we should not forget that legalities also play a crucial role in preventing harm; indeed the ‘police powers’ of the modern regulatory state take this as axiomatic. From this angle, formal law *appropriately* substitutes for interpersonal trust. Botsman and Rogers’ third element, however, belies this, stressing instead a principle of ‘trust between strangers’. In many practical settings of sharing economy initiatives, trust is managed through technology, using identity verification, reputational feedback systems and similar devices. Users can leave ratings indicating a poor quality service – such as a smelly Uber car or AirBnB room – that may disqualify the host or leave them open to higher fees. Thus, online rating systems operate primarily as economizing devices by allowing both a numerical ‘star’ rating and open-ended valuation of the providers, but also hold a *post-hoc* risk management function. Ratings would not prevent harm occurring in the first instance; thus critics of Uber have pointed to its minimal screening of drivers.

As Cameron Tonkinwise⁶⁸ has noted, the idea that trust is the powerful operative modality is actually contradicted by the way in which technological systems and architecture often *bracket* the need for trust as much as they enable its operation. Reputational feedback systems, identity verification, graded profiles and similar devices remove the need for the leap of faith implied by the notion of trust, even while they sidestep formal legal protections. Of course in small-scale grassroots settings, vernacular legalities are important, and in many

⁶⁸ ‘Sharing You Can Believe In,’ *Medium* (2014), <<https://medium.com/@camerontw/sharing-you-can-believe-in-9b68718c4b33>>, ‘A Taste for Practices: Unrepressing Style in Design Thinking’ (2011) 32 *Design Studies* 533-45.

cases do instantiate a modality of ‘trust between strangers’, as for example where a network of community-supported agriculture schemes replace individual separate insurance schemes with informally-provided mutual support and assistance. But the contested politics of the sharing economy do underpin a much greater likelihood that formal state law is invoked, whether through regulatory lobbying or direct litigation. And as sharing economy initiatives spread and become more widely used, legal issues relating to the prevention or control of harm become a central site of contestation, focused on the question of whether various police powers regulations, such as health and safety, employment protection, or environmental outcomes, should apply to ‘sharing economy’ types of initiatives. This has raised fierce internal debate and also catalysed quite extensive litigation, particularly around the sharing of transport and housing.⁶⁹

The clash between an initial culture of ‘trust between strangers’ and the operation of existing formal legal and regulatory framework reflects the fact that in many sharing economy settings, there has been genuine regulatory ambiguity. This ambiguity flows from the way in which the sharing economy rearranges taken-for-granted relationships between producers and consumers in a range of different settings, and in so doing confounds expectations of the scope of ‘regulated entities’ across a diverse range of work practices, flows of money, and risk management strategies. The regulatory ambiguities catalysed by the sharing economy sometimes appear to lead in the direction of dissenting collectivism, yet other times decisively away from that. We can see this ambiguity play out in the short history of an entity called Peers: a US-based member-driven organisation that claims to have more than 250,000 members globally.

Peers seeks ‘to grow, support and protect the sharing economy’ and its membership encompasses multiple sub-communities of the sharing economy landscape, from grass-roots commons-based projects to techno-optimistic and entrepreneurial initiatives. It has gone through an interesting evolution from its early days, initially casting itself largely in terms of an advocate for social change that could assist ordinary everyday citizens to mount ‘change.org’ petitions to state agencies against regulatory barriers to their activities (eg.

⁶⁹ *Uber Technologies Inc. v Barbara Berwick*, California Labour Commissioner Case No. 11-46739, available at <<http://www.scribd.com/doc/268946016/Uber-v-Berwick>> (holding that Uber drivers in California are employees and not contractors); *AirBnB Inc v. Eric Schneiderman, Attorney-General of New York*, New York Supreme Court, Case 5393-13, available at <<https://www.nycourts.gov/press/PDFs/AirbnbDecision.pdf>> (quashing the Attorney-General’s subpoena for host data from AirBnB as unconstitutionally vague). See also for litigation in Germany <<http://www.reuters.com/article/2015/03/18/us-uber-germany-ban-idUSKBNOME1L820150318>>.

coming from health and safety legislation, planning law or banking regulations). Even in this form, there was a thin line between viewing Peers' practices as private interest games of 'business-as-usual' or pre-figurative glimpses of something quite novel. The campaigns they sparked positioned Peers as simultaneously a lobby group for protectionist regulation and a funnel of grass-roots support for 'disruptive change' modelled along campaigning sites such as www.change.org. Peers employed diverse ways of framing the larger social purpose of the regulatory campaigns it fought on behalf of its members, mutually entangling the language of risk management with more populist narratives of protecting and empowering 'ordinary people' who seek to disrupt the business-as-usual practices of often powerful incumbents.

After only a year in operation, Peers 'rebranded' itself, moving away from the activist-advocate role and emerging as a quasi 'peak body' representing the micro-entrepreneurs who operate small-scale businesses. In this mode, even its emphasis on 'smart regulation policies' shifted, to be supplemented by directly offering products and services such as insurance and tax advice tailored to sharing economy contexts. There is a rich agenda for research here, exploring the interactions between self-regulation, changing patterns of state regulation across multiple scales and 'platform responsibilities'. These socio-legal developments dovetail with economic sociologists' observations about proliferating modes of valuation,⁷⁰ many of which are detached from money value.⁷¹

It is worth saying more about the double move embedded in negotiating regulatory ambiguity in sharing economy contexts. The first move is typically a claim to regulatory autonomy, which is then deployed along two key tracks: skirting regulatory grey areas and winning regulatory concessions. In relation to the first, because of the reconfigured relationships between producers and consumers in the sharing economy, it is often unclear whether existing regulatory regimes apply at all. One response to this has been for entrepreneurs or initiatives to evade – either surreptitiously or in some cases quite flamboyantly – the applicability of such regulation. The ride-sharing company Uber is the most publicised example of this, with its aggressive strategies of openly flouting local government laws, paying fines on behalf of its drivers, and courting consumers wanting cheaper taxi fares to lobby local government to change those regulations. But in many ways Uber's tactics differ from those of Peers and its member only in scale and tone: looked at systemically, both are

⁷⁰ K. Çalışkan and M. Callon, 'Economization, Part 1: Shifting Attention from the Economy Towards Processes of Economization' (2009) 38 *Economy and Society* 369.

⁷¹ L. Adkins, 'What Are Post-Fordist Wages? Simmel, Labor Money, and the Problem of Value' (2015) 114 *South Atlantic Quarterly* 331.

responses to the genuine ambiguity of legal applicability, and the fact that only an overtly normative policy analysis can justify a yes/no answer in many instances.

At a smaller scale, and in the absence of powerful incumbents, this becomes easier to see, especially when specific regulatory concessions have been secured. For example, should a co-working hub configured as a Community Interest Company, whose members pay rental within the building in proportion to their earnings for that month, receive discretionary relief on business rates for all its tenants, even those who are structured as a traditional limited company? Or should a private for-profit carsharing company, be allocated dedicated parking spaces by the local municipality without being charged for them, when it self-identifies as a social enterprise and ensures full open public access to all the spaces it manages?

Interestingly, when there *are* powerful incumbents, such as multinational hotel chains, food companies and car-rental companies, a pattern is emerging in respect of the regulatory or legislative concessions secured. In settings as diverse as home food businesses, insurance cover for peer-to-peer carsharing, and sharing home accommodation space through AirBnB, taxi food industries, regulatory legitimacy has been conferred by effectively exempting small-scale activity. If the sharing economy initiative's 'surplus' does no more than 'offset their costs' (in peer-to-peer carsharing for example), or exceed an annual limit (in home food businesses or AirBnB rentals for example), then it is regarded as legal. In effect, the legislation is saying 'Yes, you can do this – but not too often'. In this pattern, legislation carves out a specialised zone of practice which is exempted from being treated as 'commercial use', with the core trade-off being to provide protection against harm in exchange for limiting the extraction of 'profit'. Thus initiatives that emerge precisely to challenge distinctions between 'commercial' and 'non-commercial' activities are in due course legitimated by intricate legal frameworks that (re)formalise just such a distinction.

As can be seen from the examples given above, the claim to regulatory autonomy leads in different directions, depending on the ethos and details of its deployment. On the one hand, it can constitute essentially a new version of a familiar private interest regulatory game, albeit with a neoliberal technogloss. Actors argue vociferously for autonomy from state-based urban governance and for the autonomy to self-regulate. Where these actors control powerful platforms, as is often the case with internet-enabled initiatives in the sharing economy, many worry that they will privatise self-serving regulation in the form of platform protocols. Moreover the scale and anonymity of the web-based interface enables such rapid mass

abstraction, scaling-up and standardisation of exchange (with compensatory customisation via algorithms) that new market entrants rapidly wield (with the backing of capital) the kind of power traditionally held by incumbents. From this perspective, the pattern of regulatory reform noted above can be interpreted as a strategy to contain local self-determination within boundaries that limit its capacity to exert economic power to shift the status at a collective level.

Yet there is another facet of claiming regulatory autonomy which is much more closely allied to a legal consciousness of dissenting collectivism. From this perspective, sidestepping existing regulatory regimes is a form of activism, part of a wider pattern of social mobilisation against a broken economic model. While some rejections of existing applicable laws may be quite overt, many are almost a form of sub-activism which seek mainly to preserve a space for experimenting with novel means of reconfiguring work practices, money flows or risk management. They seek to hold back at least for a while the relatively rigid process of congealing these innovations into formal law, in order to give room for new modes of social coordination and relational interdependence to breathe, or for distinct local (non-essentialised and contingent) communities of place or interest to flourish. Where they secure formal regulatory concessions, they do so once again in order to carve out space to foster local community economies and a sense of place. From this perspective, multiple local self-determination initiatives, even when operating at limited scale, can exert collective economic power, through networking and coalitions, sufficient to enact systemic economic change. This evokes precisely the resonant core of dissenting collectivism: that sense of *collective* agency mobilised in response to disadvantage that is sustained or ignored by extractive legalities. But as optimistic as this final note may sound, it has also become clear that self-regulatory strategies can constrain surplus creation and limit scale in ways that limit the economic power of local self-determination, confining it to an inevitably ‘fringe’ position while continuing to privatise important areas of social relations on a broader scale. Scale, then, is critical – and it is to this we turn to conclude.

4. Critical mass and shared infrastructure

To preserve the plural possibilities buried in the sharing economy, then, radical transactionalism needs an institutional infrastructure to support the flourishing of the ‘atmosphere’ we referred to above, that ‘space of resonance in which certain kinds of thought

and practice seem natural and desirable⁷²The lines and paths we have sketched so far start to reimagine the ways in which law can foster interaction, keep harmful extraction in check and stitch together more humane and sustainable forms of collective organisations. But these kinds of imaginings will take root at a systemic level only if the trajectories they gesture towards attract a *critical mass* of enthusiasts. Critical mass is Botsman and Rogers' fourth principle of a collaborative economy, but one which they use largely to gesture towards sheer volume of potential consumers. This all too easily equates with calculations of viable market scale and scope, a tipping point for market research and potential investors.

Our approach essentially takes the opposite position on the calculability of the human interactions behind sharing. A more systemic understanding of critical mass would be one that understands it as *shared infrastructure* for emerging forms of economic and legal reconfiguration. What is important in this approach are questions of atmosphere, norms and cultural shifts more than the aggregation of transactions and demographic data. The everyday legal practices mapped along the first three pathways negotiate a tightrope between economic and social dimensions in their management of everyday organisational life. This fourth factor helps us view them together, such that they constitute in effect a shared infrastructure for enabling sharing economies to develop along particular trajectories.

At base, infrastructures are 'matter that enables the movement of other matter'. Infrastructure is the crucial foundation for achieving critical mass. It is in effect the platform for scaling-up, to use the language of investors so popular in extractive sharing economy initiatives. Some platforms are physical or technological: the national grid for community energy groups, public parking spaces for car-sharing companies or dedicated desks in co-working spaces are all examples. But access to such shared infrastructure will depend in part upon the choices made by an initiative in relation to its legal entity structure and its intellectual property rights. For example, grid access processes, economic arrangements and regulatory rules for community renewable energy groups together mediate the materiality of electricity production with its many social meanings. Initiatives such as community-owned renewable energy convey both the existing and potential solidarity inherent in the otherwise extractive infrastructure of electricity production. They not only challenge existing regulatory arrangements, but also suggest an alternative collective vision of production and exchange.

⁷² Op. cit., n. 41.

Underpinning this intricate dance of institutional bricolage is an appreciation of infrastructure that moves well beyond ‘mere’ material forms to encompass the arrangement of the political rationalities, organisations, accounting ledgers, audit and other governmental practices that comprise infrastructure. Crafting innovative new policy and legal support structures to foster the sharing economy calls for a dose of creative imagination about the nature of infrastructure: is it a market asset, a democratic space or a commons? Answering such a question means doing ‘what infrastructure itself has failed to do, creating situated knowledges that teach us what is underneath our society, rather than simply metering information as commodity through more optic tubes’.⁷³

Thus, in the more corporate end of the sharing economy, narrow techniques of market asset valuation rapidly dominate, resembling just this sense of numbers travelling through optic tubes. AirBnB, for example, has developed a hospitality code in order to educate its hundreds of thousands of hosts to behave ‘more like hotels’, just one example of platform self-regulation that effectively shoots legal laser beams along standardised, measurable and ultimately financeable lines. Similarly, corporate sharing platforms often calculate market potential through social network and other proxy metrics, shifting valuation from the individually held skills of workers and citizens to newly centralised and privatised sites of measurement and assessment.

Contrast this with the way in which commons-based visions of the sharing economy articulate the task developing the foundation for critical mass. As Michel Bauwens and his colleagues put it, the task is to understand ‘how to interpret the commons vision with a structure, an organizational structure and a legal structure that actually gives it economic power, market influence, and a means of connecting it to organizational forms that have durability over the long-term’.⁷⁴

CONCLUSION

⁷³ A. Rothstein, 'How to See Infrastructure: A Guide for Seven Billion Primates,' *Rhizome* (2015), <<http://rhizome.org/editorial/2015/jul/2/how-see-infrastructure-guide-seven-billion-primate/>>.

⁷⁴ M. Bauwens, D. Kleiner, and J. Restakis, 'Towards a Material Commons: Cooperativism, Peer Production and Community Venture Funds for the Commons, Interview with Michel Bauwens, Dymitri Kleiner and John Restakis,' *C-Realm Podcast* (2014), <<http://guerrillatranslation.com/2014/01/28/towards-a-material-commons/>>.

This paper has suggested that building a bridge between legal consciousness scholarship and diverse economies scholarship has fertile potential to illuminate *collective* senses of agency in response to disadvantage that is sustained or ignored by law. By bringing legal consciousness and diverse economies into conversation with each other, we offer a fertile approach to the analysis of community-level action for sustainability, including its troubled relationship to the emerging 'sharing economy'. This new agenda considers struggles over transactional legality as a neglected site of activism for sustainability, opening a window into debates about the substantive fairness of specific sharing economy initiatives. The diverse forms of economic life are a neglected facet of legal consciousness literature, in particular in the way they illuminate transactional legalities rather than the more familiar legalities embedded in public law, social welfare and human rights that often dominate law and social change literature. Recognising and stressing the diversity of both economic life and forms of law opens up an understanding of 'radical transactionalism', where legal building blocks of property and capital can be reimagined and reconfigured, and monochromatic visions of the sharing economy given fresh colour.

We hope that future research by ourselves and others can draw on this framework to explore concrete instances of community-based sustainability actions and sharing economy initiatives in the contexts of the history and trajectory of particular local settings. This will potentially re-energise the original spirit of legal consciousness research, enabling scholars to explore the ways in which cultural narratives about legality constrain and/or enable social action. It also has the potential to expand the reach of diverse economies research, creating a conversation that illuminates our understanding of the role of law in society and in everyday lives.

The different paths along which we have mapped the emergent 'everyday law' of the sharing economy are united by experimentation with ownership and control in ways that are open to an economic whole animated by collective agency, rather than profit extraction. These experiments will define in very precise ways who, both within and beyond these emerging initiatives, owns the assets, the income streams and the right to participate in decision-making. All too often, the intricate detail of formal solutions to specific legal problems leads to the imbrication of law with financialisation strategies, in ways that work against the grain of democratising the sharing economy. Thus, we eschew the laying of yet more optical fibers of financialisation and instead propose that shared infrastructure must be situated in ways that enable *not* a preference for access over ownership, but *shared access to ownership*.

The potential for shared infrastructure usefully complicates presumed dichotomies between generative and extractive versions of the sharing economy. The optics of finance cannot or should not be dispensed with entirely: individualised and financialised models of ownership and control compete – and overlap⁷⁵ – with broader visions of commons-based governance. As these rub up against each, *multiple* future trajectories emerge. Our point, following diverse economies research and demonstrated through network analysis, is that each should become known on their own terms.

Lawyers could be immensely helpful here. As Will Davies has argued, 'twenty public-spirited lawyers could save the world'.⁷⁶ The paths we have traced along the diverse legalities of sharing economies position 'public-spirited law' in unexpected ways. Radical transactional lawyers, in dialogue with committed regulatory civil servants, may be the most interesting site of the negotiations around regulatory ambiguity that shape the future trajectories of sharing economies. Work such as Janelle Orsi is doing could multiply and mushroom to produce such an effect, and the proliferating networks and coalitions around alternative economic trajectories may soon include more overtly legal ones. These could sow seeds that reimagine legal interventions and regulatory frameworks along lines crafted away from Botsman and Rogers' elements of collaborative consumption and towards that vision of the 'good society' implicit in dissenting collectivism in which pro-ecological practice [is] linked to more egalitarian, trust-based, and communal forms of work and trade'.⁷⁷ Stitched together into shared infrastructure for a new economy, these lines could put business lawyers at the centre of a transformative public-spiritedness.

⁷⁵ S. De Paoli, V. D'Andrea, and M. Teli, 'Why Free Software Is Not the Antonym of Commercial Software: Two Case Studies from Corporate and Volunteer Based Projects' (2012) 1 *Journal of Peer Production*.

⁷⁶ W. Davies, 'Recovering the Future: The Reinvention of 'Social Law'' (2013) 20 *Juncture* 216.

⁷⁷ D. Cooper, 'Time against Time: Normative Temporalities and the Failure of Community Labour in Local Exchange Trading Schemes' (2013) 22 *Time & Society* 31.

